Laborers International Union of North America, Local 81, AFL–CIO *and* Kenny Construction Company and International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 395, AFL–CIO. Case 13–CD–629–1

April 17, 2003

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge was filed on December 11, 2001, by Kenny Construction Company (the Employer). The charge alleges that the Respondent, Laborers International Union of North America, Local 81, AFL–CIO (Laborers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 395, AFL–CIO (Ironworkers). The hearing was held on January 3, 2002, before Hearing Officer Elizabeth Galliano.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is an Illinois company engaged in the construction of underground tunnels, shafts, and systems used for flood control and for access to fresh water. Within the past calendar year, a representative period, it purchased and/or received goods and materials valued in excess of $50,000 indirectly from points located outside the State of Indiana. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Ironworkers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a general contractor engaged in the construction of underground tunnels and shafts in Wisconsin, Illinois, and Indiana. In February 2001,[1] the Employer began work associated with the shaft and tunnel construction at the Borman Park Tunnel Project for Indiana American Water Company in Gary, Indiana. On February 1, during the prejob conference, the Employer orally assigned the steel rod and iron mesh work at the project to its employees, who are represented by the Laborers. This assignment was subsequently confirmed in writing. In March, Ironworkers' business agent, James Blevins approached the Employer's project manager, Paul McDermott at the jobsite. Blevins questioned the assignment of the work to employees represented by the Laborers and informed McDermott that the steel rod and wire mesh work on the project belonged to employees represented by the Ironworkers. Blevins showed McDermott a copy of the Ironworkers' collective-bargaining agreement, which the Employer had signed when it utilized some employees represented by the Ironworkers on a bridge project in the early 1980s and which was still in effect. The Employer did not reassign the work. By letter dated April 5, the Ironworkers notified the Employer that it was filing a grievance over the work assignment with the Joint Trade Board.

On April 20, the Joint Trade Board awarded the work to the Ironworkers. The Employer appealed the Joint Trade Board's award to Federal court and the Ironworkers counter-claimed for enforcement. By letter dated October 26, the Laborers threatened the Employer with action, including striking and picketing, if the work was reassigned to the Ironworkers. At the time of the hearing, employees represented by the Laborers had completed approximately 90 percent of the steel rod and iron mesh work on the Borman Park Tunnel Project.

B. Work in Dispute

At the hearing, the parties agreed to a modification of the work in dispute from that described in the original notice of hearing. Pursuant to that agreement, the work in dispute consists of the handling, placement, and installation of reinforcing steel rods and wire mesh for the construction of the tunnel and shaft and facilities associated with shaft and tunnel construction at the Borman Park Tunnel Project for Indiana American Water Company in Gary, Indiana.

C. Contentions of the Parties

The Ironworkers contend that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the notice of hearing should be quashed. The Ironworkers argues that, prior to the hearing in this case, it effectively disclaimed any interest in the remaining

[1] Unless otherwise specified, all dates are in 2001.

disputed work.[2] The Ironworkers further contends that there are no competing claims for the disputed work because, under the Board's decision in *Capitol Drilling*,[3] it did not make a claim for the disputed work when it filed a grievance to enforce its contract with the Employer. In the alternative, should the Board find that a jurisdictional dispute exists, the Ironworkers argue that the disputed work should be awarded to the employees it represents, based on its collective-bargaining agreement with the Employer, area and industry practice, and relative skills.

The Employer argues that there is reasonable cause to believe that the Laborers violated Section 8(b)(4)(D) of the Act since it is undisputed that the Laborers threatened to strike and picket if the disputed work was reassigned. The Employer further argues that the Ironworkers' disclaimer is ineffective and designed to avoid an authoritative ruling on the merits of the dispute. As to the merits of the dispute, the Employer and the Laborers contend that the work in dispute should be assigned to employees represented by the Laborers, based on the collective-bargaining agreement between the Employer and the Laborers, the Employer's preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

D. Applicability of the Statute

Before the National Labor Relations Board may proceed with a determination of the dispute pursuant to Section 10(k) it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated.[4] This determination requires a finding that there is reasonable cause to believe (1) that a party has used proscribed means to enforce its claims to the work in dispute and (2) that there are competing claims to the disputed work between rival groups of employees.[5] The first requirement is satisfied in this case because it is undisputed that the Laborers threatened to strike and picket the Employer. Contrary to the Ironworkers' contention, we find that the second requirement is also met and that the Board's decision in *Capitol Drilling*, supra is distinguishable.

Capitol Drilling, involved a union's grievance against a general contractor alone, and not against the subcontractor who actually had the authority to assign the disputed work. Absent a direct claim (grievance) against the subcontractor, the Board found no competing claims for the work and quashed the notice of 10(k) hearing. In this case, although the Employer is the general contractor on the Borman Park Tunnel Project, it has assigned the disputed work to its own employees, and thereby retains the authority to assign the disputed work. Accordingly, we have a traditional 10(k) situation in which two unions have collective-bargaining agreements with the employer, and each union claims that its contract covers the disputed work assigned and controlled by the employer. Consequently, we find that there are competing claims to the disputed work between rival groups of employees.

Further, we reject the Ironworkers' contention that it has effectively disclaimed the work in dispute. Although it is well settled that an effective renunciation of work in dispute resolves a jurisdictional dispute,[6] the Board will refuse to give effect to "hollow disclaimers" interposed for the purpose of avoiding an authoritative decision on the merits.[7] Here, the Ironworkers' purported disclaimer was offered at the start of the hearing when the disputed work was 90 percent complete. The disclaimer ran only to future work, and not to the 90 percent already completed. In addition, the Ironworkers are actively engaging in conduct inconsistent with the disclaimer by seeking to enforce the Joint Trade Board decision ordering the Employer to reassign the work. For these reasons, we find the Ironworkers' disclaimer ineffective.[8] We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

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[2] At the start of the hearing, the Ironworkers presented a letter disclaiming interest in all future disputed work, and moved that the notice of hearing be quashed. The hearing officer accepted the document, but denied the Ironworkers' motion, reserving the issue for the Board.

[3] *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995).

[4] The parties stipulated that there is no agreed-upon method for a voluntary settlement of their dispute.

[5] E.g., *Carpenters Local 275*, 334 NLRB 422, 423 (2001).

[6] *Laborers (Georgia-Pacific)*, 209 NLRB 611, 612 (1974), citing *Laborers Local 935 (C&S Construction Co.)*, 206 NLRB 807 (1973); and *Sheet Metal Workers Local 55 (Gilbert L. Phillips)*, 213 NLRB 479, 480–481 (1974).

[7] See *Mine Workers (Conn-Serv)*, 299 NLRB 865, 868 (1990); *Plasterers Local 502 (Advance Terrazo)*, 272 NLRB 810, 811 (1984); and *Laborers Local 910 (Brockway Glass)*, 226 NLRB 142, 143 (1976).

[8] See *Electrical Workers Local 98 (LaSalle University)*, 324 NLRB 540 (1997); *Ironworkers Local 197 (Del Guidice Enterprises)*, 291 NLRB 1, 2 (1988); *Carpenters Local 56 (Jeremiah Sullivan Sons)*, 269 NLRB 98, 99 (1984); and *Plumbers Local 703 (Airco Carbon)*, 261 NLRB 1122, 1124 (1982).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreements

The Employer has collective-bargaining agreements with both the Laborers and the Ironworkers. The Laborers' contract specifically covers performing the steel rod and wire mesh and tunnel work. Article I of the contract states:

> "7 . . . The loading, unloading, carrying, distribution and handling of all rods, mesh and materials for use in reinforcing concrete construction . . . ."
> "14 . . . All Labor work, including skilled and semi-skilled, in connection with . . . tunnel or compressed air projects."
> "19 . . . all work in connection with shafts, tunnels, subways and sewers; construction of sewers, shafts, tunnels, subways and caissons."

In contrast, the Ironworkers' contract covers the "maintenance of reinforcing steel, including wire mesh, while concrete is still being poured" and does not mention tunnel work. Accordingly, we find that this factor slightly favors assigning the work in dispute to employees represented by the Laborers.

2. Employer's preference and past practice

The Employer, in accordance with its preference, and consistent with its practice of more than 20 years, has assigned the disputed work to its own employees represented by the Laborers. We find that the Employer's preference and past practice favor awarding the disputed work to employees represented by the Laborers.

3. Area and industry practice

Employees represented by the Laborers have performed the disputed work in the greater Chicago and upper Midwest area. Employees represented by the Ironworkers have performed the disputed work in various locations in the United States. Accordingly, we find that this factor does not favor an award to employees represented by either union.

4. Relative skills

The record discloses that employees represented by the Laborers and the Ironworkers possess the required skills to perform the disputed work. Employees represented by the Laborers received job specific training, including a 3-day safety orientation and tunnel awareness class. Also, it is undisputed that the employees represented by the Ironworkers are skilled at performing steel rod and wire mesh work. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either Union.

5. Economy and efficiency of operations

The Employer does not employ employees represented by the Ironworkers. Further, the disputed work is only a small portion of the amount of the work being performed on the jobsite and is done for short periods of time. Consequently, the Employer would face additional costs by hiring employees represented by the Ironworkers to perform the work in dispute while also retaining its own employees represented by the Laborers to perform other traditional work assignments. Accordingly, we find that this factor favors the assignment of work to employees represented by the Laborers.

6. Joint board determinations

The Joint Trade Board found that the Employer had violated its contract with the Ironworkers by assigning the disputed work to employees represented by the Laborers and ordered the Employer to award the work in dispute to members of the Ironworkers. The minutes of the Joint Trade Board proceedings, however, indicate that it was concerned only with the alleged contract violation. Except for the collective-bargaining agreement with the Ironworkers, there is no evidence that the Joint Trade Board considered any of the factors the Board considers in making an award in a 10(K) proceeding. Accordingly, we find that the Joint Trade Board's decision does not favor an award of the work to either group of employees.[9]

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, the Employer's preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union, or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Kenny Construction Company represented by Laborers International Union of North America, Local 81, AFL–CIO are entitled to perform the handling, placement, and installation of reinforcing steel rods and wire mesh for the construction of the tunnel and shaft and facilities associated with the shaft and tunnel construction at the Borman Park Tunnel Project for Indiana American Water Company in Gary, Indiana.

[9] *J.P. Patti Co.*, 332 NLRB 830 (2000).